Antitrust Law Consideration for Community Access Program Participants

Prepared for the Health Resources and Services Administration

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October 30, 2001

I. INTRODUCTION AND EXECUTIVE SUMMARY

The federal antitrust laws prohibit trade practices and arrangements that unreasonably restrain trade or that create or attempt to create monopolies.[1] Their purpose is to promote competition and protect consumers against competitors who engage in certain collective and concerted conduct that results in excessive "market power" in "relevant markets."[2] Accordingly, the federal antitrust laws are designed to both regulate and encourage competition.

In the health care industry, the federal antitrust laws encourage competition among health care providers to promote health care services of the highest quality and the best possible price. Competition ensures that the cost of inpatient care is not unnecessarily inflated, that pharmaceuticals and other medical supplies are accessible when needed and that consumers are offered the latest in medical technology. If, however, the industry's participants agree to fix price, collectively negotiate contracts, and actively prevent others from entering the market, they will quickly gain market power, driving up prices and diminishing the quality of available health care goods and services.

Moreover, collective and concerted actions that violate antitrust laws need not be intentional. Thus, for example, an agreement among a community's primary care providers to delegate certain functions (such as utilization review, case management or laboratory services) among themselves in an effort to create substantial efficiencies and avoid duplication may be viewed as an illegal market allocation if the agreement results in any single provider assuming sole responsibility for a particular function but fails to achieve the desired efficiencies.

By its very definition, the CAP program is designed to promote collective and concerted actions by health care providers serving the uninsured. The program assists applicants in the development and operation of networks and collaborations that involve hospitals, community health centers, local governments and other health care providers. The program's objective is to increase the effectiveness and capacity of the nation's health care safety net providers and thereby provide expanded access to quality health care services for the uninsured and underinsured in our nation's communities. These efforts are designed to achieve health care delivery systems that offer a seamless continuum of care to underserved populations and the elimination of unnecessary and duplicative functions. However, the structure of each CAP consortium and its activities

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[1] See generally the Sherman Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12-27. State antitrust laws generally mirror these federal statutes. However, the laws of the state in which the CAP consortium conducts its business should be researched to determine what, if any, different (and possibly more stringent) requirements exist.

[2] Market power takes into account both product market, i.e., the services offered, and geographic market, i.e., the service area.

should be carefully reviewed to assure that in the process of achieving these benefits the consortium and its activities do not give rise to antitrust concerns.

This issue brief provides an overview of the federal antitrust laws' prohibitions, the standards employed by the federal government in applying the federal antitrust laws to the collaborative activities of health care providers, descriptions of some of the "safety zones" that may be available to protect CAP collaborations from federal antitrust challenges, and state action immunities that may apply to remove the activities from a potential antitrust challenge.

When establishing and operating provider networks, or when sharing financial, administrative or clinical functions with other providers, CAP consortia and their participants should pay close attention to the types of activities to be conducted and plan for an appropriate level of integration and implementation of other safeguards to ensure that the activities will not result in antitrust violations. Networks that are structured in an appropriate manner "on paper" but that do not actually implement that structure leave themselves open to potential exposure under the antitrust laws. CAP consortia should consider seeking the advice of qualified legal counsel to ensure that their arrangements do not run afoul of antitrust laws.

II. AN OVERVIEW OF THE FEDERAL ANTITRUST LAWS

A. The Federal Antitrust Laws

In promoting competition, the federal antitrust laws seek to prohibit trade practices and arrangements that unreasonably restrain trade or that create or attempt to create monopolies.

1. The Sherman Act

Section 1 of the Sherman Act prohibits any "contract, combination or conspiracy," that unreasonably restrains interstate or foreign commerce.[3] For example, agreements among competitors to fix prices or engage in a group boycott of a competitor are obvious examples of collaborative activities that violate the law's prohibition. Competitor activities are subject to criminal and/or civil prosecution under the Sherman Act if the following key elements are present:

(a) "concerted action" of two or more parties,
(b) who have entered into an "agreement," and
(c) that is both designed to be and has the unlawful "effect of unreasonably restraining trade."

[3] 15 U.S.C. § 1.

Section 2 of the Sherman Act makes it an offense to monopolize, attempt to monopolize, or combine or conspire to monopolize any part of interstate or foreign commerce.[4] Violations of the Sherman Act are punishable by imprisonment for up to three years and/or fines of up to $350,000 for individuals and $10 million for corporations per violation. An alternative provision of the law authorizes fines of up to twice the gross gain or twice the gross loss if any person derives pecuniary gain from the offense or if the offense results in pecuniary loss to a person other than the defendant.[5]

2. The Clayton Act

Section 2 of the Clayton Act prohibits discrimination in prices between different purchasers in the sale of a commodity where the effect may be substantially to lessen competition or tend to create a monopoly.[6] Section 3 of the Clayton Act prohibits exclusive dealing and tying arrangements involving the sale of commodities, where the effect may be to substantially lessen competition or tend to create a monopoly.[7] While these provisions govern the sale of commodities and may therefore not be especially relevant to CAP participants, Section 7 of the Clayton Act prohibits mergers, joint ventures, consolidations or acquisitions of stock or assets where the effect may be to substantially lessen competition or tend to create a monopoly.[8]

The Clayton Act empowers any person "injured in his business or property" by reason of a violation of the Sherman Act and/or Clayton Act to sue for treble damages.[9] To recover damages, a plaintiff must demonstrate more than just injury to himself, but injury to competition as a whole. In addition, the Clayton Act authorizes a private party to obtain an injunction for "threatened loss or damage" by a violation of the antitrust laws.[10]

B. Enforcement of the Federal Antitrust Laws

The government agencies that enforce the antitrust laws, the United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), have generally looked upon joint ventures in the health care arena favorably, viewing them as pro-competitive. Antitrust concerns may arise, however, when organizations that normally act as competitors collaborate in a manner that is expressly prohibited under the federal antitrust laws such as price fixing, market allocation or group boycotting. To respond to industry concerns, the agencies have issued various policy statements and guidelines that describe the principles employed by the agencies in evaluating various

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[4] 15 U.S.C. § 2.
[5] 18 U.S.C. § 3571(d).
[6] 15 U.S.C. § 13.
[7] 15 U.S.C. § 14.
[8] 15 U.S.C. § 18.
[9] 15 U.S.C. § 15.
[10] 15 U.S.C. § 26.

types of health care provider arrangements. The agencies also respond to requests for additional guidance in the health care antitrust arena. The DOJ issues such guidance in the form of business reviews letters, whereas the FTC issues additional guidance in the form of advisory opinions.[11]

1. Statements of Antitrust Enforcement Policy in Health Care Affiliations

The agencies' joint Statements of Antitrust Enforcement Policy in Health Care Affiliations ("Policy Statements") are of particular relevance to health care providers. Originally issued in 1993 and most recently revised in 1996, the Policy Statements address nine types of health care transactions and include a number of "safety zones" that protect certain health care provider transactions from antitrust enforcement actions.[12] Specifically, the Policy Statements contain guidelines governing the following types of health care ventures:

- hospital mergers
- hospital joint ventures involving high-technology or other expensive medical equipment
- hospital joint ventures involving specialized clinical or other expensive health care services
- providers' collective provision of non-fee-related information to purchasers of health care services*
- providers' collective provision of fee-related information to purchasers of health care services*
- provider participation in exchanges of price and cost information*
- joint purchasing arrangements among health care providers*
- physician network joint ventures*
- multiprovider networks

If the criteria of a particular safety zone are met, the parties will be protected from antitrust prosecution notwithstanding the presence of anti-competitive harm. Safety zones with particular relevance to CAP participants, as indicated by the asterisk (*), are discussed in Section III.C of the issue brief, below.

An arrangement that does not fit precisely within the bounds of one of the available safety zones will not necessarily be viewed as illegal since analysis under the antitrust laws is inherently fact intensive. If collaboration among providers is likely to produce significant efficiencies for the benefit of consumers, the venture may still pass

[11] Business Review Letters issued by the DOJ may be found on the agency's webpage at http://www.usdoj.gov/atr/public/busreview/letters.htm. FTC health care antitrust advisory opinions are posted on the FTC's webpage at http://www.ftc.gov/bc/advisory.htm.

[12] The Policy Statements are posted on the FTC's website at http://www.ftc.gov/reports/hlth3s.htm.

antitrust muster provided that the resulting anti-competitive harms are reasonably related and necessary to accomplish certain pro-competitive benefits. To determine whether such integration violates the federal antitrust laws, the enforcement agencies apply a fact-based "rule of reason" analysis. Under the analysis, the anticompetitive effects of the integration are balanced against its pro-competitive effects. If the agencies determine that, on balance, the beneficial effects outweigh the harmful effects on competition, no enforcement action will be taken. For a more detailed discussion of the rule of reason analysis, see Section C.2, below.

2. Antitrust Guidelines for Competitor Collaborations

In addition, in April 2000, the FTC and DOJ finalized their Antitrust Guidelines for Collaborations among Competitors ("Guidelines"), which present the analytical framework that the agencies apply in assessing the likely competitive effects of "competitor collaborations." The Guidelines are consistent with the Policy Statements and apply to competitor collaborations in all industries including the health care sector. By issuing the Guidelines, the agencies sought to assist collaborating businesses in assessing the likelihood of an antitrust challenge and to promote pro-competitive business ventures. For purposes of the Guidelines, competitor collaborations are defined as collaborations that are generally of limited duration and that preserve some form of competition among the parties. The Guidelines focus on collaborations that involve one or more agreements between or among competitors to engage in such business activities as research and development, production, marketing and distribution, as well as information sharing and various trade association activities. Because mergers usually end competition between the merging parties, mergers as well as competitive collaborations that eliminate all competition among collaborators are not covered by the Guidelines.[13]

The analysis employed by the DOJ and FTC in its review of antitrust cases, and its review of competitor collaborations, is discussed in the section below.

III. ANALYSIS OF COLLABORATIVE ARRANGEMENTS UNDER ANTITRUST LAW

A. The Per Se Illegal Standard

The courts use two types of analysis to determine the lawfulness of an arrangement among actual or potential competitors. Certain arrangements are considered inherently or per se "anti-competitive." They include arrangements to fix price, group boycott and allocate markets and certain other collusive behavior. As a result, no inquiry

[13] Mergers and competitive collaborations that eliminate all competition are analyzed pursuant to the agencies' Horizontal Merger Guidelines. The Antitrust Guidelines for Collaborations Among Competitors and other guidelines issued by the FTC and the DOJ can be accessed on the Internet at http://www.ftc.gov/bc/guidelin.htm.

into the arrangement's business purposes is made under the per se standard nor is any consideration given to the arrangement's pro-competitive benefits or the overall effects of the arrangement.

B. The Rule of Reason Standard

Other arrangements among competitors, such as mergers, consolidations, joint ventures, agreements to exchange competitively sensitive information and agreements to deal exclusively with a particular supplier, are analyzed under the "rule of reason" to determine their overall competitive effect. The rule of reason analysis requires a careful application of the particular facts and circumstances to the law to determine the lawfulness of a particular arrangement. Specifically, the rule of reason assesses whether there are any anti-competitive effects resulting from the arrangement and, if so, whether these are reasonably related and necessary to achieve pro-competitive effects. If so, the pro-competitive effects must outweigh the anti-competitive effects.

The DOJ and FTC Guidelines set forth the analytic steps under the rule of reason. The agencies first examine the nature of the agreement to determine the agreement's underlying business purposes and any anti-competitive harm that may result. If the nature of the agreement and an absence of market power demonstrate an absence of anti-competitive harm, no challenge will ensue. If, on the other hand, the agencies determine that there is a potential for anti-competitive harm and that there are no overriding benefits to offset such harm, the agreement may be challenged without further analysis.

Where, however, an arrangement produces both a potential for anti-competitive harms as well as pro-competitive benefits, the agencies will determine that a further market analysis is warranted before making a decision as to whether to challenge an agreement. In such cases, an in-depth analysis is conducted including, for example, an analysis of the relevant geographic and product markets, any market power exercised by the parties in question and other market and non-market factors such as entry and exclusivity.[14] If, upon completion of the market analysis, the agencies find that there is no potential for anti-competitive harm, no further action is taken. If, however, the market analysis indicates some anti-competitive harm, the agencies analyze the agreement to determine whether it is reasonably necessary to achieve verifiable pro-competitive benefits that offset the harm.

[14] One issue that may present problems for CAP participants, particularly those located in rural areas, is the definition of the geographic market. In past FTC and DOJ reviews, the crucial issue has been the definition of the geographic market relevant to the entities entering into a joint agreement. If the agencies narrowly define the geographic market, the affiliating entities may be viewed as exercising dominant market power in violation of the federal antitrust laws. On the other hand, if the agencies broadly define the geographic market, other competitors will be considered in the antitrust analysis.

The Guidelines identify pro-competitive benefits as:

- goods or services that are cheaper, more valuable to consumers, or brought faster to market
- better use of existing assets or an increased incentive to make output-enhancing investments
- greater cost-effectiveness and efficiencies

The Guidelines attribute such benefits to competitor combinations of the participants' different capabilities or resources, such as technical expertise, or the attainment of scale or scope economies by combining activities such as marketing or research.

In addition, the Guidelines identify anti-competitive harms as competitor collaborations that increase the ability or incentive profitably to raise prices or reduce output, quality, service or innovation. Anti-competitive harms may result from agreements that limit competitors' independent decisionmaking authority or that combine competitors' control over (or financial interests in) production, key assets or decisions regarding price, output or other competitively sensitive variables. Arrangements that contemplate such practices as the sharing and disclosure of competitively sensitive information may facilitate explicit or tacit collusion and result in anti-competitive harm.

C. Relevant Safety Zones For CAP Participants

As indicated above, the FTC and DOJ Policy Statements establish certain antitrust safety zones for transactions involving health care providers under which, absent extraordinary circumstances, activities conducted by the providers will not be found to violate antitrust laws. Certain safety zones permit financially and/or clinically integrated providers acting to collectively negotiate contracts and share competitively sensitive information, albeit within closely prescribed circumstances. Other safety zones authorize non-integrated providers to engage in joint activities with the assurance that their actions will not be subject to an antitrust challenge. Bear in mind that an arrangement that does not fit precisely within the bounds of one of the available safety zones will not necessarily be viewed as illegal. Rather, the arrangement will be evaluated under a rule of reason analysis.

1. Antitrust Safety Zone for Integrated Providers

Included among the safety zones is one that is specific to physician network joint ventures. A network of physicians that meets the criteria of the physician network safety zone can negotiate and contract with third parties as a single entity on behalf of its network providers and, absent extraordinary circumstances, be assured that it is not in violation of antitrust laws. Certain types of activities involving an exchange as between

potential or actual competitors of competitively sensitive information are permissible if the safety zone's criteria are met, including:

- exchanging information related to current or future fees, costs, wages, salaries, benefits, credit terms, bids or negotiations with third party payors or purchasers, or other financial information, including the development of reporting systems that result in the exchange of such information

- developing and implementing joint pricing strategies for payors and patients, including standard fee schedules for patient billing

- discussing and coordinating strategic, marketing and promotional plans of network providers developed in connection with activities not limited to uninsured populations outside the scope of the network, e.g., information relating to current market shares

- allocating services, markets or patients, including, but not limited to agreements to eliminate duplicative services, agreements to bilaterally refer patients to one another (unless in accordance with a provider's independent professional judgment), and the development of a patient tracking system if the system is results in the allocation of patients

- jointly negotiating and contracting with third party payors, vendors, purchasers or providers or agreeing not to deal with certain payors, vendors, purchasers or providers

In order to fall within the safety zone, the members of the network must share substantial financial risk (i.e., capitation payments and fee withholds) and demonstrate other indicia of financial integration (e.g., make substantial capital investments in the collaboration, execute participating providers contract that provides for capitation payments with risk pools, and/or engage in coordinated activities/services that the individual providers could not do by themselves). In addition, the network must not include more than 30% of primary care or specialty physicians in the relevant market if it is a non-exclusive network, or if exclusive, not more than 20% of primary care or specialty physicians in the relevant market.[15]

[15] In addition to satisfying one of the criteria of the integrated provider network safety zone, compliance with the applicable proportion of physicians can help to ensure that the network does not amass sufficient market power (and engage in certain actions) that can be viewed as an attempt to monopolize the relevant market or an agreement to restrain competition. Although monopolization (or attempted monopolization) is generally aimed at conduct by a single entity, two or more entities possessing a specific intent to monopolize and taking overt actions towards that goal can be viewed as conspiring to monopolize.

In lieu of financial integration, a provider network may be able to demonstrate sufficient integration and thereby avail itself of the protections afforded under the safety zone for integrated provider networks if the network is both sufficiently clinically integrated and non-exclusive. Indicia of clinical integration include:

- mechanisms to monitor and control utilization of health care services to control costs and assure quality of care
- purchase of information systems necessary to gather aggregate and individual data to measure performance of the group and individual providers against cost and quality benchmarks
- monitoring of patient satisfaction with network providers
- provision to payors of detailed reports on costs and quantity of the services delivered by participating providers, and on the collaboration's success in meeting its goals
- employment of a medical director and/or support staff to perform the above functions and to coordinate patient care in specific cases
- investment of significant time in the development of practice standards and protocols, and in actively monitoring the care provided through the network
- remedial action against providers who fail to adhere to network standards and protocols, including practice modification, imposition of penalties and, if applicable, expulsion from the network

Increasingly, the FTC and DOJ have recognized the potential benefits associated with clinical integration of health care providers. For example, the FTC in an advisory opinion letter issued in July, 2000 considered the shared functions of a proposed network of pharmacies providing a package of "patient care and other services" in connection with the medical management of patients with chronic or long-term illnesses.[16] A level of financial integration, achieved through allocation of 50% of charges into a risk pool, would be implemented to support the proposed network functions. These included the development and implementation of standardized protocols and programs and the centralization of certain claims processing and administrative functions. The agency

[16] Federal Trade Commission, Bureau of Competition, Advisory Opinion to Paul E. Levenson (July 27, 2000).

concluded that it would not challenge the network on antitrust grounds reasoning that the proposed services have the potential to provide significant benefits to consumers and that the price agreement among network members appears to be reasonably related to achieving those benefits.

An agreement among health care providers that is limited to an exchange of information concerning best practices or the development of shared protocols, however, is unlikely to qualify for the antitrust safety zone and may expose the participating providers to antitrust liability if the activity results in increased prices for the providers' services. The risk pool implemented by the pharmacy network described in the above FTC advisory opinion creates a financial incentive for the network's pharmacies to ensure the network's success and the likelihood of obtaining the desired efficiencies. Absent further financial and/or clinical integration by the collaborating providers, the incentive – and the likelihood of substantial benefits to the consumer – is reduced.

We note that the agencies' Policy Statements also address multiprovider networks. These types of networks include providers from various different sectors and levels within the health care industry and, as a result, the antitrust analysis of these networks contemplates both the horizontal (provider vs. provider) and vertical impact (provider vs. managed care plan) of the arrangement. The Policy Statements indicate that the agencies apply the same review criteria that they apply to physician networks. The Policy Statements, however, do not establish a safety zone for multiprovider networks as they do for physician network joint ventures. The policy statement on multiprovider networks explains that the agencies do not have sufficient experience analyzing such networks to articulate a safety zone.

2. Antitrust Safety Zones for Providers Lacking Substantial Integration

The agencies' Policy Statements also include antitrust safety zones for non-integrated providers. These safety zones authorize health care providers to engage in other types of collaborative activities notwithstanding a lesser level of financial and/or clinical integration provided that adequate safeguards are implemented and competitively sensitive information is not exchanged. Examples of these types of activities include:

- the collecting and sharing of non-fee related information (such as medical and service-related data)
- the collecting and sharing of historical fee-related data
- participation in surveys of certain types of information (historical prices for health care and related services, historical wage and salary information)

- joint purchasing programs relating to health care products or services

a. Antitrust Safety Zone for the Provision of Non-Fee-Related Information To Purchasers of Health Care Services

The agencies' Policy Statements for non-integrated providers include a safety zone that permits the collective provision of non-fee-related information by competing health care providers to a purchaser. Absent extraordinary circumstances, the DOJ and FTC will not challenge these activities if undertaken in compliance with the safety zone's criteria. Examples covered in the agencies' discussion of the safety zone include:

- a medical society's collection of outcome data from its members about a particular procedure that members believe should be covered by a purchaser and the subsequent provision of the information to the purchaser

- the development by providers of suggested practice parameters that also may provide useful information to patients, providers and purchasers

By creating a safety zone for the collective provision of non-fee-related information, the agencies recognize that the provision of underlying medical data that may improve purchasers' resolution of issues relating to the mode, quality or efficiency of treatment is unlikely to raise antitrust concerns. The Policy Statements make clear, however, that any attempt by providers to coerce purchasers to follow their recommendations, by implying or threatening a boycott or by collectively refusing to deal with purchasers who object, would risk antitrust challenge.

b. Antitrust Safety Zone for the Collective Provision of Fee-Related Information to Purchasers of Health Care Services

The DOJ and FTC Policy Statements establish a further safety zone for non-integrated providers that may be relevant to CAP participants. The safety zone authorizes the collective provision of factual fee-related information to purchasers of health care services to assist the purchasers in developing reimbursement terms to be offered to providers and otherwise be useful to purchasers. Providers may collect information concerning fees (current or historical) or other aspects of reimbursement, including capitation arrangements, risk-withholds and all-inclusive fees, provided that they satisfy certain conditions designed to ensure that an exchange of price or cost data is not used by

competing providers to coordinate provider prices or costs. To qualify for the safety zone, the following conditions must be met:

- the collection is managed by a third party (e.g., a purchaser, government agency, health care consultant, academic institution or trade association);

- although current fee-related information may be provided to purchasers, information that is shared among or made available to competing providers furnishing the data must be more than three months old; and

- for any information that is available to the providers furnishing data, there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data may represent more than 25 percent on a weighted bases of that statistic, and any information disseminated must be sufficiently aggregated such that it would not allow recipients to identify the prices charged by any individual provider.

c. Antitrust Safety Zone for the Participation in Exchanges of Price and Cost Information

Recognizing that consumers will benefit if non-integrated providers are permitted to use price and compensation surveys to price their services more competitively and attract highly qualified personnel, the FTC and DOJ established a safety zone for provider participation in written surveys of price and cost information or of information concerning wages, salaries and benefits notwithstanding the absence of financial integration among the participating providers. The safety zone does not require the providers to demonstrate financial or clinical integration; however, to safeguard against potential collusive and other improper practices, providers must meet the following conditions:

- the survey is managed by a third-party (e.g., a purchaser, government agency, health care consultant, academic institution or trade association);

- the information provided by survey participants is based on data more than three months old; and

- there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25 percent on a weighted basis of that

statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.

d. Antitrust Safety Zone Joint Purchasing Arrangements

The FTC and DOJ recognize that similar consumer benefits are derived from joint purchasing arrangements as long as the arrangement does not result in the effective exercise of market power, price fixing or the reduction of competition. If structured appropriately, joint purchasing arrangements involving non-integrated health care providers will permit the providers to obtain volume discounts and reduce their transaction costs to purchase goods and services such as computer or data processing services and prescription drugs and other pharmaceutical products. Absent extraordinary circumstances, the FTC and DOJ will not challenge a joint purchasing arrangement if the following two conditions are met:

- the purchases account for less than 35 percent of the total sales of the purchased product or service in the relevant market; and

- the cost of the products and services purchased jointly accounts for less than 20 percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement.

3. Additional Activities for Providers Lacking Substantial Integration

In addition to the specific activities described in the aforementioned safety zones, provider collaborations lacking substantial financial and/or clinical integration are often able to engage in certain conduct to further and support the development and implementation of their collaborative activities, provided that safeguards are in place to prohibit the sharing of competitively sensitive information. Further, all information shared, as well as activities performed, should be narrowly tailored to apply solely to the scope of the collaboration. Examples of such activities include:

- developing and implementing strategic plans limited to specific activities undertaken by the network.

- developing and implementing administrative and clinical practices and procedures.

- developing protocols for shared services and personnel.

- establishing shared information systems and clinical and administrative management systems.

- establishing joint patient tracking systems.

D. The Messenger Model

Collaborating providers that are insufficiently integrated to qualify for the safety zone applicable to physician network joint ventures should use a "messenger model" arrangement when negotiating and contracting with third parties to ensure that price fixing does not occur. Under a messenger model, a third party serves as a negotiator-intermediary between providers and purchasers. Although no safety zone covers this type of arrangement, the DOJ and FTC have recognized the use of messenger models and have stated that such arrangements "when properly designed and administered, rarely present substantial antitrust concerns."[17] Both agencies have, however, scrutinized messenger model arrangements that were not properly administered.

Critical features of the messenger model include:

- the messenger cannot divulge, and the messenger and the providers cannot share, price or other competitive terms and conditions of any contract negotiated for (or with) one provider to another provider unless done so in accordance with an antitrust safety zone; however, the messenger can facilitate the drafting of minimum contracting terms and conditions ("contracting guidelines"), which are compiled and obtained separately from – and for – each provider, and that, individually, each provider is willing to accept and communicate the guidelines to payors.

- the messenger cannot disseminate to the providers the views and intentions of other providers regarding a proposal(s) unless done so in accordance with an antitrust safety zone; however the messenger can facilitate each provider's understanding of the proposed contract terms and conditions by providing objective information about such terms.

- the messenger cannot collectively negotiate and contract for the providers and cannot coordinate their responses to a proposal(s); however the messenger can communicate to each provider individually the contract offers from payors.

[17] See Statements of Antitrust Enforcement Policy in Health Care, Statement 9 (Multiprovider Networks).

- providers must make independent, unilateral decisions regarding acceptance or rejection of contractual terms offered by a payor.

- the messenger cannot bind an individual provider to a contract, unless terms fall within a previously determined acceptable range, and the messenger has the explicit and specific authority to do so by that provider. The parties to the contract should be the individual provider and the payor.

- individual providers must remain free to conduct negotiations independent of the messenger ("non-exclusivity").

The FTC and DOJ have scrutinized networks that represent themselves as messenger model arrangements to assess the networks' adherence to the Guidelines. For example, in September 2000, the FTC successfully settled antitrust charges against an Alaska physician association comprised of physicians practicing in the Fairbanks area, and prohibited the network from engaging in illegal concerted actions to fix prices and other competitively significant terms of dealing with area health plans. Despite the network's assertions of being a messenger model arrangement, the network effectively acted as its members' exclusive bargaining agent with payors by (1) inappropriately negotiating price and other contract terms with payors based on a pre-determined fee schedule and a model contract, (2) refusing to transmit to members offers that did not meet the network's standards and terms, and (3) advising members that to obtain better prices and other contractual terms, they should deal with payors exclusively through the network. As a result of these actions, consumers were subjected to higher prices and more limited choices concerning physician services and new health plans were either blocked or substantially delayed from entering the area market.

E. State Law Considerations

1. State Action Immunity Doctrine

Under the judicially established "state action immunity doctrine," state agencies, municipalities, other types of local government and even private parties may, under appropriate circumstances, be immune from antitrust liability.[18] In general, the state action immunity doctrine provides that the aforementioned entities or individuals acting within the scope and purview of a state statute or regulation may be immune from antitrust liability for certain anti-competitive conduct. We note that entities such as public hospitals have been considered municipalities for purposes of the state action immunity doctrine.

[18] Although the actions of the federal government and of state governments are generally immune from federal antitrust prosecution, state agencies, cities and local governments are not automatically immune.

The state action immunity doctrine sets forth a two-pronged legal test that must be satisfied if antitrust immunity is to be granted. First, the substitution of competition must be "clearly articulated and affirmatively expressed as state policy." The expression of clear state policy should be based on specific, detailed legislative authorization and, further, should reflect some affirmative expression that the state has reasonably foreseen the potential anticompetitive effects. Second, the policy must be "actively supervised" by the state. Under this second prong, state officials must have, and must exercise, the power to review and regulate the particular acts of private parties and disapprove anti-competitive acts that fail to accord with state policy. Further, the state must exercise sufficient independent judgment and control so that the anti-competitive conduct is a product of deliberate state intervention.[19]

Significantly, immunity is no longer applied to all anti-competitive actions occurring under statutory authority. Over time, the courts have established standards to limit the applicability of state action immunity.

2. State Health Care Collaboration Statutes

For health care providers developing and implementing collaborations, a state "health care collaboration statute" may provide the clear state policy and active supervision necessary to establish immunity from antitrust liability. Approximately half of all states have enacted such legislation to encourage voluntary cooperative agreements among physicians, hospitals and other health care providers. These state health care collaboration statutes are intended to improve both the quality of, and access to, health care services, while achieving cost efficiencies in the delivery of these services. Most of these state immunity statutes permit hospitals, physicians, and other health care providers to enter into joint venture or merger agreements if these agreements will result in lower health care costs in the community.

Procedurally, these statutes contemplate significant government involvement in reviewing and monitoring the proposed collaborative arrangement. If the arrangement is approved, the parties to the arrangement are granted state action immunity for conduct that is otherwise regarded as potentially violative of state and/or federal antitrust laws. CAP consortia may wish to carefully consider the requirements and potential protections afforded under a specific state health care collaboration statute and whether it makes sense for the consortium to avail itself of the process.

IV. CONCLUSION

This issue brief provides an overview of the federal antitrust laws and some of the considerations that should be given by CAP consortia and their participants as they

[19] State agencies, municipalities and other local government need only satisfy the first prong to be granted immunity under federal antitrust law.

implement their CAP projects. Depending on their specific plans, CAP consortia may wish to consult with legal counsel to assess their compliance with both federal and state antitrust laws. If structured appropriately or with the appropriate safeguards in place, CAP consortia may engage in a variety of activities that will benefit the uninsured without substantial risk of an antitrust challenge.